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YAMAHA MOTOR CO. LTD.

v.

YAMAHA (M) SDN. BHD. & ORS.

FEDERAL COURT, KUALA LUMPUR

WAN SULEIMAN FJ

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ABDUL HAMID OMAR FJ

MOHD. AZMI FJ

[CIVIL APPEAL NO. 80 OF 1981]

13 DECEMBER 1982

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CIVIL PROCEDURE: *Application for leave to amend Amended statement of claim - When to allow - Whether Judge exercised his discretion judicially - Allegation of fraud or conspiracy - Whether amendment disclosed reasonable cause of action.*

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The appellants were judgment creditors of the first respondent. By an amended statement of claim dated 22 May 1980 the appellants sued the four respondents for an order that a debenture issued on 24 November 1977 by the first respondent in favour of the second respondent be declared null and void, for lack of consideration. The third and the fourth respondents were included in the suit in their capacity as Receivers and Managers of the first respondent.

The crux of the defence was that the appellants had no reasonable cause of action as they were not a party either to the debenture or charge and denied that the debenture was created without consideration.

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By summons in chambers dated 20 February 1981 the appellants applied for leave to amend the amended statement of claim. The learned Judge dismissed the application with costs and issued a certificate under O. 56 r. 2 (a) Rules of the High Court, 1980, certifying that he required no further argument in respect of the appellant's application. This is the appeal from the dismissal.

*f***Held:**

[1] The amendment did not introduce any cause of action, it merely showed why the debenture was null and void. The alleged conspiracy or fraud was a mere extension of the allegation that the debenture was null and void for lack of consideration.

[2] The learned Judge had failed to exercise his discretion judicially.

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[Appeal allowed with costs. Order set aside and appellants granted leave to amend their amended statement of claim.]

Cases referred to:

Kam Hoy Trading v. Kam Fatt Tin Mine [1963] MLJ 248

Bently and Co. (Ltd) v. Black 9 TLR 580

*h***Legislation referred to:**

Exchange Control Act 1953, s. 11

Rules of the High Court 1980, O. 20 rr. 5(4), (5), O. 56 r. 2(2)

Rules of the Supreme Court 1957, O. 28

For the appellant - Mohd. Ismail b. Shariff; M/s. Zain & Co.

For the 1st respondent - Joseph Loo; M/s. Ariffin & Ooi

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For the 2nd respondent - Lim Chor Pee (Yap Soon Nam with him); M/s. Chor Pee & Co.

For the 3rd & 4th respondents - C.F. Leow; M/s. Leow & Co.

JUDGMENT

Mohd. Azmi FJ:

This is an appeal from the dismissal of an application under O. 20 r. 5, Rules of the High Court 1980, for leave to amend the amended statement of claim after pleadings had closed but before the commencement of actual trial.

By the amended statement of claim dated 22 May 1980, the appellants as judgment creditors of the first respondent, sued the four respondents for an order that a debenture issued on 24 November 1977 by the first respondent in favour of the second respondent, be declared null and void. Although the debenture was purportedly issued to secure a principal sum of six million Singapore dollars which was alleged to be due from the first respondent to the second respondent, it is pleaded that no such debt was in fact owing to the second respondent, and even if there were such a debt, everything had been settled prior to the date of issue of the said debenture and as such the 1977 debenture was null and void for lack of consideration. The appellants also challenged the validity of a charge created by the first respondent in November 1977 in favour of the second respondent, over a piece of land at Batu Tiga, Selangor, pursuant to the said debenture to secure repayment of the alleged loan. The third and fourth respondents were brought into the picture merely in their capacity as Receivers and Managers of the first respondent appointed under the impugned debenture. The appellants therefore prayed for an order that their appointments be declared null and void as well, and they also sought for other consequential reliefs. By July 1980, the four respondents had filed their statements of defence, and the crux of their defence was that the appellants had no reasonable cause of action against them on the grounds that the appellants were not a party either to the debenture or the charge. They also denied that the debenture was created without consideration. They maintained that a debt in the principal sum of not exceeding six million Singapore dollars was owing to the second respondent by the first respondent as recited in the debenture. By summons in chambers dated 20 February 1981, the appellants applied for leave to amend the amended statement of claim. When the application came up for hearing in chambers on 10 March 1981, it was dismissed with costs. On the same day the learned Judge allowed an application by the respondents for a point of law to be tried to determine whether as judgment creditors of the first respondent, the appellants had any right in respect of the debenture. The learned Judge also issued a certificate under O. 56 r. 2(2) Rules of the High Court, certifying that he required no further argument in respect of the appellants' application.

Looking at the proposed amendment to the amended statement of claim, it would if allowed have three significant effects. Firstly, the appellants would be suing not only in their capacity as judgment creditors but also as majority shareholders of the first respondent company (paras. 2, 3 and 5). Secondly, fraud (or unlawful conspiracy as the appellants would prefer to call it) would be pleaded expressly in the creation of 1977 debenture instead of mere lack of consideration and security for non-existent debt (paras. 21 to 34). Thirdly, by para. 35 of the proposed amendment, s. 11 of the Exchange Control Act 1953 would be pleaded to render both the debenture and the charge null and void. But before us only the first and second effects are being canvassed seriously.

Under O. 20 of the Rules of the High Court 1980, which is equivalent to O. 28 Rules of Supreme Court, a Judge has a discretion to allow leave to amend pleadings. Like any other discretion, it must of course be exercised judicially [see *Kam Hoy Trading v. Kam Fatt Tin Mine* [1963] MLJ 248]. The general principle is that the Court will allow such amendments as will cause no injustice to the other parties. Three basic questions should be considered to

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- a* determine whether injustice would or would not result, (1) whether the application is *bona fide*; (2) whether prejudice caused to the other side can be compensated by costs and (3) whether the amendments would not in effect turn the suit from one character into a suit from one character into a suit of another and inconsistent character. (See Mallal's *Supreme Court Practice* p. 342). If the answers are in the affirmative, an application for amendment should be allowed at any stage of the proceedings particularly before trial, even if the effect
- b* of the amendment would be to add or substitute a new cause of action, provided the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the original statement of claim. In this appeal it is unfortunate that the learned Judge had failed to set out anywhere in the appeal records the factor or factors which he had taken into consideration in the exercise of his discretion to dismiss the appellants' application. We must therefore review the application
- c* afresh.

- On the first group of amendment regarding the appellants' capacity as majority shareholders of the first respondent company, we note that the appellants do not by the amendment seek to change their capacity to sue as envisaged under O. 20 r. 5 (4) Rules of the High Court. All they want to do is to invoke their own right as shareholders of the first respondent company in addition to their right as judgment creditors to the said company, which has
- d* now gone into liquidation. Mr. C.F. Leow, Counsel for third and fourth respondents, argues that if the appellants failed as judgment creditors they would also fail as shareholders. That, we think is prejudging the issue. At this stage of the proceedings the Court is not concerned with the merit of appellants' case. Even after amendment, the respondents have the right to take necessary steps to strike out the whole claim if the statement of claim, as amended,
- e* does not disclose any cause of action or is found to be frivolous and vexatious and an abuse of process of the Court.

- The second respondents' objection to the amendment is two-fold. Firstly, they say the proposed amendment does not disclose a reasonable cause of action, even if it could be allowed. Secondly, as a legal proposition based on the authority of *Lawrence v. Lord Norreys* 39 Ch D 213 and *Bentley & Co. (Ltd.) v. Black* 9 TLR 580, the Court will not allow an
- f* amendment for the purpose of adding a plea of fraud, where fraud has not been pleaded in the first instance, except in the most exceptional circumstances. The answer to the first objection is that the amendment does not in reality introduce any new cause of action. The amendment merely shows more clearly why the debenture is null and void. Mr. Lim Chor Pee, Counsel for the second respondent, whose submission is adopted by Counsel for the first respondent, has meticulously shown to us from the facts of the case why the appellants'
- g* claim would fail with or without the amendment. That may or may not be so, but in the final analysis it is for the trial Court eventually to decide the merit of appellants' claim after hearing all the evidence and arguments. As to the second objection, O. 20 r. 5 (5) provides:

- An amendment may be allowed under para. (2) notwithstanding that the effect of the amendment will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of
- h* which relief has already been claimed in the action by the party applying for leave to make the amendment.

- In alleging 'fraud' or 'conspiracy' in the proposed amendment, we are of the view that having regard to the original amended statement of claim, the appellants have not in effect, turned the original claim which is for an order to declare the 1977 debenture null and void for lack of consideration, into a claim of another and inconsistent character. From the very beginning,
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the appellants' claim is that there was in fact no debt at all due from the first respondent to the second respondent giving rise to any legal right to create the 1977 debenture and charge. By the proposed amendment, the appellants merely allege that as there was no money due between the two parties, the debenture was created as a result of conspiracy or fraud by the first and second respondents and others. The alleged conspiracy or fraud is, to our mind, a mere extension of the allegation that the debenture is null and void for lack of consideration. Indeed on the facts of the present case, even if the allegation of fraud can be held to constitute a new cause of action, the amendment is allowable under O. 20 r. 5(5) as it arises out of the same facts or substantially the same facts as the original cause of action in which the relief has already been claimed by the appellants in the original pleading. Thus, as to the second objection, in view of the nature of the original suit, the Court should in the exercise of its discretion allow the amendment even if it had the effect of introducing a plea of fraud for the first time, on the ground that the amendment would not only be in the interest of justice but also for the purpose of determining the real questions in controversy between the parties. In our view, *Lawrence v. Lord Norreys (ante)* and *Bentley & Co. (Ltd.) v. Black (ante)* are no authorities for dismissing the present appeal. Not only are the facts in those two cases different, but no judicial pronouncement was made to exclude fraud altogether from any amendment if it is pleaded for the first time before the same Court before judgment. Indeed in *Lawrence Case*, in commenting that the proposed amendment on the plea of fraud was intended to defeat the operation of the Statute of Limitation, Bowen LJ went on to state at p. 235 that:

No Court ought to refuse leave to make such amendments if it saw any reasonable prospect, or, I may say, reasonable probability, that a case could be made of fraud which would defeat the statute - that there was any substance in the case, that it was not simply fiction and imagination.

In requiring an affidavit to explain why fraud had not been pleaded in the first instance and how the plaintiff came to think that there was ground for putting it forward, the requirement should be read in the light of the facts that before the amendment was applied in the Chancery Division, a similar application had already been dismissed in the Queens Bench Division which had refused leave to amend and struck out the statement of claim and dismissed the plaintiffs' action on ground that no cause of action was shown. Similarly, in *Bentley & Co. (Ltd.) v. Black (ante)* after judgment was given for the plaintiffs, the defendants applied for a new trial in the Court of Appeal. One of the objections raised by the plaintiff was that fraud had not been pleaded in the first instance i.e. in the original trial and neither had any amendment been made for the purpose of setting up a plea of fraud. It was in this context that Lord Esher MR said:

It had for a long time been the universal practice, except in the most exceptional circumstances, not to allow an amendment for the purpose of adding a plea of fraud where fraud had not been pleaded in the first instance.

In the appeal before us, the amendment to include a plea of fraud was not made during a retrial or before another Court after judgment had been given. On the materials before us and at this early stage of the proceedings it would be wrong for us to conclude that the alleged fraud has no substance whatsoever and that it is simply the appellants' fiction and imagination. The appellants summons in chambers was supported by affidavit sworn on 20 February 1981 by Mr. Varghese George. The contents of this affidavit had not been materially challenged by the only affidavit in reply sworn by Mr. Soo Hock Ho, a director of the first respondent. From the contents of Mr. Soo's affidavit, it was not disputed that the

- a* appellants were a party to a series of litigation with parties related to the first and second respondents. One of these was Kuala Lumpur High Court Civil Suit No: 2173 of 1978, the trial of which had been completed. Since the conclusion of the said trial and as a result of further search, new facts and matters had emerged which the appellants had been advised to include in their pleadings which were relevant and necessary for the fair trial of the present action. There is nothing in the appeal record and the argument before us to suggest that the
- b* appellants' application was made *mala fide*, or that whatever prejudice that might be caused to the respondents cannot be compensated by costs. Nor have the respondents been able to show that by such amendment, the original suit would be turned into a suit of different and inconsistent character. Further, by their defence, the respondents have admitted that the appellants had obtained judgment against the first respondent on 12 September 1979, for the sum of US\$7,589,271.05 cts. *vide* Kuala Lumpur High Court Civil Suit No. 2963 of 1978.
- c* Since the first respondent has now gone into liquidation, it is apparent that as unsecured creditors of the first respondent, the appellants would have slim chance of enjoying the fruits of their judgment, unless they are allowed full opportunity to prove their claim that the 1977 debenture was null and void and of no effect. As shareholders they might also have an interest in the debenture if indeed it was fraudulently issued.
- d* In our view, the learned Judge had not exercised his discretion judicially. We would therefore allow this appeal with costs. The order of the learned Judge dated 10 March 1981 is set aside. The appellants are granted leave to amend their amended statement of claim in terms of the summons in chambers dated 20 February 1981.

Also found at [1983] 1 CLJ 191

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